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Supreme Court, U.S.
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No. 95-461

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In The

Supreme Court of the United States

October Term, 1995

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JOSEPH MASSARO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether, in order to establish the requisite interstate commerce nexus in a criminal prosecution under the Hobbs Act, 18 U.S.C. §1951, the Constitution requires the Government to *prove* that a defendant's conduct had some *actual* effect, or in the case of a conspiracy charge, the potential to cause some *actual* effect, on interstate commerce?

2. Whether the Government's failure to disclose the discovery of a crucial piece of evidence, to wit, a matching bullet, until after opening statements and cross-examination of a witness had begun violates a defendant's rights under the Due Process Clause?

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JOSEPH MASSARO,

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UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Joseph Massaro petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

On August 1, 1994, following a jury trial, the United States District Court for the Southern District of New York, entered its judgment setting forth the convictions and imposing sentence on petitioner Joseph Massaro. The May 18, 1995 decision of the United States Court of Appeals for the Second Circuit affirming

Massaro's convictions and sentences in unpublished. (Appendix A, *infra*)[1]

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Second Circuit pursuant to 28 U.S.C. §1254(1). The Second Circuit filed its opinion on May 18, 1995. (App.A)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Fifth Amendment; and

2. 18 U.S. 1951(a) and (b)(3) (the Hobbs Act), and

3. Rule 16(B) and (C) of the Federal Rules of Criminal Procedure

The relevant constitutional and statutory provisions are set forth in Appendix "B"

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[1] Materials contained in the Appendix attached to this Petition are referred to as "App." followed by the letter and page number. References to the trial transcript are proceeded by the notation "TR" and references to the Joint Appendix filed in the Court of Appeals are proceeded by the notation "JA."

STATEMENT OF THE CASE

In 1993, the United States ("Government") filed an 18-count indictment against petitioner Joseph Massaro and five co-defendants, charging them with various racketeering crimes. Following a nine-week jury trial in the United States District Court for the Southern District of New York (Cederbaum, J.), Massaro was convicted of conspiring to participate and participating in the affairs of a racketeering enterprise in violation of 18 U.S.C. §1962(c) and (d) (Counts I and II); murder in aid of racketeering in violation of 18 U.S.C. §1959(a)(1); (2) (Count III); extortion in violation of 18 U.S.C. §§1951, 2 (Counts IV - VI); conspiracy to make extortionate extensions of credit and to use extortionate means to collect in violation of 18 U.S.C. §§892, 894 (Counts VII - VIII); loansharking in violation of 18 U.S.C. §§893, 2 (Count IX); and traveling interstate in aid of the extortion racketeering counts in violation of 18 U.S.C. §§1951, 2 (Count X).

The district judge sentenced Massaro to life imprisonment on counts I, II and III; concurrent terms of twenty years imprisonment on Counts IV - IX; and a concurrent term of five years imprisonment on Count X. The district judge also imposed a fine of $240,000 and ordered Massaro to pay restitution of $104,100.

On appeal, the United States Court of Appeals for The Second Circuit affirmed Massaro's convictions and sentences in an unpublished five-page opinion. (App.A).

A. Statement of Facts

The Government's case against Massaro was that he was a member of the Lucchese Family of La Cosa Nostra who from the late 1970's until the early 1990's participated in a pattern of racketeering activity which included using threats, violence, extortion and arson to secure and expand his control over the topless bar industry in Long Island; extortion of other businesses; operating a loansharking business and a horse betting parlor; and murdering a racketeering associate.

1. *The Government's Lack of Proof That the Alleged Acts of Extortion Had Any Effect on Interstate Commerce*

As he did in the Second Circuit, Massaro challenges the Government's failure to prove that the conduct alleged in five predicate acts (numbers 7, 11, 13, 15, and 18) in the indictment, involving Partner's Lounge, Tiffany Shooting Star Theatrical Agency, the Class Act Bar, Carousel Lounge and Excaliber Lounge) and one substantive count (originally Count XI which eventually became Count VI, involving Partner's Lounge). All of the conduct at issue involves allegations that Massaro committed or conspired to commit extortion in violation of the Hobbs Act, 18 U.S.C. §1951. To satisfy the jurisdictional, interstate commerce requirement of the Hobbs Act, the Government relied on the "depletion of assets" theory: that Massaro's alleged extortionate conduct depleted the victims' assets, leaving them with less money to spend on goods and services that moved in interstate commerce.

For example, the business at issue in predicate act 11 was Tiffany Shooting Star Theatrical Agency, a

booking agency that provided topless dancers to local bars. The Government asserted that Massaro extorted an individual--the agency's owner, Glen Hudson--and ultimately took control of the agency. Thus, the Government asserted that the depletion of Hudson's assets affected his ability to engage in interstate commerce. But there was no proof that Hudson was actively and directly engaged in interstate commerce. Nor was there any evidence that the agency *purchased* items in interstate commerce, hired dancers from outside New York or otherwise in any way engaged in interstate commerce. Indeed, the Government's theory of an interstate commerce nexus with respect to the extortion of Hudson and Tiffany's was two-fold: (1) that "Massaro's extortion and ultimate takeover of Tiffany's depleted Hudson's assets and affected Hudson's ability to purchase goods through interstate commerce;" and (2) that the jury could "infer" that by affecting Hudson's assets and Tiffany's business, Massaro's conduct "potentially" affected the bars' ability to obtain topless dancers on whom their financial viability depended, thereby causing an adverse impact on the bars' ability to purchase items in interstate commerce. (United States Brief in the Second Circuit, at 61).

Only with respect to Partner's Lounge (predicate act 7 and Count VI), did the Government elicit any testimony or offer any evidence regarding the victim's potential involvement in interstate commerce. Even in that instance, however, the sole evidence was testimony from the owner of Partner's Lounge to the effect that the bar purchased some liquor that was not produced in New York. There was no evidence quantifying this connection to interstate commerce. Moreover, solely on the basis of that testimony, the Government asked the jury and the

Second Circuit to "infer" that all of the bars identified in the predicate acts and count at issue here (Partner's Lounge, the Class Act Bar, Excaliber Lounge and Carousel Lounge) were engaged in interstate commerce. Other than the testimony regarding Partner's Lounge, there was *no* proof that any of the businesses involved in predicate acts 7, 11, 13, 15 and 18 and Count VI in any way engaged in interstate commerce or that Massaro's conduct alleged in those charges had any effect--substantial or otherwise--on interstate commerce.

With respect to the Hobbs Act charges, the district court instructed the jury that "[i]f you decide that there would have been any effect at all on interstate commerce, that is enough to satisfy this element. The effect can be minimal." (TR. 5411). Not surprisingly, during deliberations the jury sent out a note requesting further instructions regarding how to determine what effect, if any, some of the alleged acts of extortion (*e.g.*, involving Tiffany's and Partner's Lounge) had on interstate commerce. The Government argued to the district court that "[i]t is hard for each one of us to wake up in the morning without having some impact, however minimal, on interstate commerce." (Tr. 5537). The district court opined that with respect to the Tiffany agency and Glen Hudson, "[i]t is a close question, I must say. The cases strain very hard." (TR. 5540). Nonetheless, the court observed that "[i]f you look at the amount of legislation in the United States today, that is because there is almost nothing that doesn't affect interstate commerce." (TR. 5542). Ultimately, the court further instructed the jury as follows:

> I want to respond orally to one of your requests about interstate commerce in relationship to

> extortions with Tiffany's and Partner's Lounge. The requirements of the interstate commerce elements may be satisfied if you find that the victim of the extortion was left, as a result of the extortion, with less money to spend on goods and services that moved in interstate commerce. It also would be sufficient if a business that was the victim or target of the extortion purchased, as part of that business, commodities or goods that traveled in interstate commerce. For example, if you were to find beyond a reasonable doubt that Partner's Lounge dealt in liquors that were imported or shipped interstate, then the interstate element would be satisfied. With respect to conspiracy to commit extortion, the Government need only show a realistic probability that, if successful, the plan would have affected interstate commerce, however subtly. (TR. 5551-52).

Ultimately, the jury found Massaro guilty of the various charges set forth above. The district judge sentenced Massaro to life imprisonment on Counts I (RICO conspiracy), II (substantive RICO violation) and III (murder in aid of a racketeering enterprise), and a concurrent term of twenty years imprisonment on Count VI (Hobbs Act Violation), all of which depended either in whole or in part on the interstate commerce findings described above.[2]

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[2] Although a determination that none of these acts had the requisite connection to interstate commerce thus would not result in a reversal of all Massaro's convictions and sentences, some of which are based on violations of other federal statutes, Massaro nonetheless would be entitled to a new trial on at least Counts I (RICO conspiracy), II (RICO substantive violation),III (murder in aid of a racketeering enterprise engaged in interstate commerce), which relied on these alleged acts of extortion either directly or as predicate acts. That result is not altered by the fact that Massaro has not challenged other predicate acts which might support the conviction. As this Court has noted previously, satisfying

2. *The Government's Belated Discovery and Disclosure of the Bullet.*

According to the proof at trial, in September, 1990 Massaro and the Government's key cooperating witness, Patrick Esposito, murdered Joseph Fiorito, an associate in Massaro's "crew," because Fiorito had been making losing bets in Massaro's name at a horse betting parlor. Esposito related the tale of the murder which he and Massaro jointly planned and carried out at an empty house on Long Island. Esposito testified that while en route to dispose of the body, Massaro fired a final shot into Fiorito's head. (TR. 390-447). They then abandoned the body and the car in a Queens neighborhood. The next day the police found the body and a spent shell casing in the car, which could have come from the shots fired in the house and fallen out of Fiorito's clothing. No bullet was found in the car. (TR. 904-934).

In 1992, after state charges against Esposito had been dismissed as a result of his cooperation, the car

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RICO's "pattern" requirement is not simply a matter of counting up predicate acts. *See H.J. Inc. v. Northwestern Telephone Co.*, 492 U.S. 229, 238 (1989) (the RICO statute sets "only the *minimum* number of predicate acts necessary to establish a pattern; and it assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts involved"). Moreover, the jury clearly was concerned about the proof of interstate commerce regarding the predicate acts at issue here, and their understanding of the law in this respect may well have influenced their overall findings. Finally, a determination that the Government had not established five predicate acts at the least might affect the district court's sentencing decision on the RICO counts (Counts I, II, and III).

used to transport Fiorito's body was released from state custody. A month before trial in 1993, the car was traced to its new owners and, one day before opening statements, a bullet was discovered underneath the carpeting. By this time, three years had gone by since the shooting. (TR. 3684-3701, 4160-4192)

The Government failed to notify the defendant of the discovery before counsel delivered his opening statement, waiting until after the first week of trial testimony to make the disclosure. The positive results of laboratory tests were not made available for another two weeks. (JA. 107, 110-12) By this point, however, the defense had already opened to the jury on the theory that there was no physical evidence connecting the defendant to the shooting. (TR. 41-2) Counsel had already prepared an elaborate defense strategy with expert testimony to show that Patrick Esposito's testimony regarding the murder was implausible, uncorroborated and incredible. The trial court offered a continuance, but denied the defendant's motion for a mistrial as well as his motion to preclude the evidence.

The evidence of Massaro's participation in the murder of Joseph Fiorito was far from overwhelming, both in terms of physical evidence and evidence of motive. Although Esposito testified that Massaro carried the bleeding body three times, there was no blood on the front passenger seat where Massaro was allegedly seated. (TR. 710, 715, 931).

More importantly, it was Esposito who had the strongest motive to kill Fiorito. According to Esposito, Massaro mentioned killing Fiorito after learning that

Fiorito had lost over $10,000 in fake bets through an account in Massaro's name. This occurred, however, one and one half years before the murder. (TR. 370-373, 602-3). During that period of time, Esposito and Fiorito had an ongoing criminal relationship which they agreed to hide from Massaro. Massaro knew nothing of the 36 burglaries and 15 robberies Esposito and Fiorito committed together. (TR. 614, 619, 695).

A day or two before the murder, Esposito learned that Fiorito had stolen from and therefore crossed an unrelated organized crime member, and Esposito was concerned that he would be held accountable. (TR. 379-383). On cross-examination, Esposito also testified that he told a psychologist that Fiorito was murdered because he scammed Esposito's jeweler without giving him a cut. (TR. 687).

Although Massaro had managed to live with affronts from Fiorito for a year and a half, Fiorito was murdered the day after he double-crossed his clandestine partner, Esposito.[3]

The defendant argued on appeal that the Government's negligent and dilatory conduct with regard to the investigation, discovery and disclosure of the bullet substantially prejudice his defense and deprived him of a fair trial.

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[3] The testimony of several defense witnesses corroborated the fact that, shortly before the murder, Fiorito and Esposito had a serious falling out. (TR. 3837-3887; 4321-4332; 4495-4516; 4521-45243).

3. The Second Circuit's Disposition of the Appeal

Massaro appealed his convictions and sentences to the United States Court of Appeals for the Second Circuit, raising eight points of error for review, including that there was no proof regarding interstate commerce with respect to the predicate acts and substantive count based on the Hobbs Act. The Second Circuit affirmed Massaro's convictions and sentences in an unpublished five-page opinion. Although its decision was rendered on May 18, 1995, well after this Court's decisions in *United States v. Lopez*, 514 U.S.___, 115 S.Ct. 1624 (1995), and *United States v. Robertson*, 514 U.S.___, 115 S.Ct. 1732 (1995), the Second Circuit did not address Massaro's interstate commerce issues nor did it cite either of those cases.[4]

The Second Circuit addressed only the question whether the district court erred in refusing to grant a mistrial or preclude admission of the bullet. In addressing that claim, the Second Circuit declared that the decision

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[4] Instead, the second Circuit ignored these substantial issues and relied on an unpublished opinion to dispose of the appeal. It would not be fair to Massaro, who is facing life imprisonment, for this Court to deny certiorari in this case on the ground that the Second Circuit did not issue a lengthy, published opinion fully addressing the interstate commerce issues. Such a decision would simply create an incentive for the lower federal courts to avoid this court's scrutiny by ignoring substantial issues or relying on unpublished opinions. More importantly, the practices of issuing no opinion, ignoring substantial claims of error, or relying on unpublished opinions arguably could result in a violation of a litigant's rights to due process and right of access to the courts, especially in criminal cases.

whether to grant a mistrial or preclude admission of the evidence was within the discretion of the district court, and that such a decision would not be reversed absent a showing of substantial prejudice to the defendant. (App. A at 10a). Although it acknowledged that the Government's delay in notifying Massaro of the discovery of the bullet was "regrettable," *id.* at 8a, and there was "no question but that the Government should have advised the defense immediately of the bullet's discovery," *id.* at 8a - 9a, the Second Circuit nonetheless opined that "the Government's conduct did not irreparably damage Massaro's strategy" *Id.* at 9a. In Support of that conclusion, the court relied on the fact that Massaro had other information with which to attack Esposito's credibility and that Massaro's trial counsel declined the district court's offer of a continuance. *Id.* at 9a - 10a.

REASONS FOR GRANTING THE WRIT

I. This Case Cleanly Presents Unsettled Commerce Clause Issues On Which This Court Granted Certiorari in *United States v. Robertson*, 514 U.S.__, 115 S.Ct. 1732 (1995) (*per curiam*), But Ultimately Found Unnecessary to Resolve.

A. Introduction

In the *United States v. Robertson*, 15 F.3d 862 (9th Cir. 1994), the Ninth Circuit held that the activities of a gold mine located in Alaska were not sufficient to satisfy the requirement that they "affect" interstate commerce, a prerequisite to a criminal conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, *et seq.* This Court granted certiorari, 513 U.S.__, 115 S. Ct. 354 (1994), to resolve the following question:

> Is the interstate movement of goods and people in connection with the operation of [the Alaska] gold mine sufficient to justify the conclusion that the activities of the gold mine affect interstate commerce within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(a)?

Ultimately, however, the Court concluded that it was unnecessary to answer the question presented in order to uphold Robertson's conviction. In *United States v. Robertson*, 514 U.S.___, 115 S.Ct. 1732 (1995) (*per curiam*), the Court observed that the evidence presented at Robertson's trial demonstrated that (1) the gold mine purchased items from outside Alaska, (2) the gold mine

brought workers from outside Alaska to work in the mine and (3) Robertson himself took proceeds from the mine's operations to places outside Alaska. The Court then held that:

> *Whether or not these activities met (and whether or not, to bring the gold mine within the "affecting commerce" provision of RICO, they would have to meet) the requirement of substantially affecting interstate commerce*, they assuredly brought the gold mine within 1962(a)'s alternative criterion of "any enterprise.....engaged in..... interstate or foreign commerce U.S. at___, 115 S.Ct. at 1733 (emphasis added).

Thus, the question remains unanswered whether there is any limit to the reach of federal criminal statutes such as the Hobbs Act which crimlinalize conduct that "in any way or degree," 18 U.S.C. §1951(a), affects interstate commerce. The Government's reliance on, and the lower court's endorsement of, an attenuated version of the already problematic depletion of assets theory in this case suggests that most lower federal courts currently recognize no limit.

Thirty-five years ago this Court declared that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215 (1960).[5] At the time, however, the Court declared that

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[5] See also *United States v. Culbert*, 435 U.S. 371, 373 (1978) ("These words [the "in any way or degree" language] do not lend themselves to a restrictive interpretation"). *Cf. Perez v. United States*, 402 U.S. 146 (1971) (the Commerce Clause

> [T]here are two essential elements of a Hobbs Act crime: interference with commerce and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplugage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. *Id.* at 218.

Since *Stirone* this Court has not reconsidered the scope of the Hobbs Act's interstate commerce requirement. And although some members of the Court have expressed concern about the scope of the Hobbs Act and its effect on federalism, *see, e.g., Evans v. United States* 504 U.S. 255,278, 290 (1992) (Thomas, J., dissenting, joined by The Chief Justice and Justice Scalia) ("The Court's construction of the Hobbs Act is repugnant to basic tenets of federalism."), this Court has never considered the validity of the depletion of assets theory so frequently relied upon by the Government and endorsed by the lower courts in Hobbs Act prosecutions.

This case cleanly presents an opportunity for this Court to address an important commerce issue that arises frequently in Hobbs Act prosecutions--whether the depletion of assets theory, either in its original form or the greatly attenuated version the Government relied upon in this case, satisfies constitutional requirements. Ultimately, this case presents the Court an opportunity to address and clarify for the lower federal courts what effect, if any, *United States v. Lopez*, 514 U.S.____, 115 S. Ct. 1624

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gives Congress the authority to criminalize loansharking, even if engaged in only on a local level and involving purely intrastate conduct).

(1995),[6] has on federal criminal statutes such as the Hobbs Act which Congress drafted to reach "all commerce over which the United States has jurisdiction," 18 U.S.C. §1951(b)(3), and which the lower federal courts generally have interpreted expansively.

B. The Substantial Commerce Power Issues Raised In This Petition Merit The Court's Attention

1. *The Depletion of Assets Theory Under the Hobbs Act*

In order to establish the interstate commerce nexus with respect to the five predicate acts and one substantive count at issue in this case, the Government relied solely upon the depletion of assets theory, *i.e.*, that Massaro's extortion depleted the assets which the victim could use to

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[6] *See Lopez*, 514 U.S. at ___, 115 S. Ct. at 1642-43 (Thomas, J., concurring) ("In an appropriate case, I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence."). *Cf. Moore v. United States*, No. 94-642, *cert denied*, 514 U.S.__, 115 S. Ct. 1838 (1995) (Scalia, J., dissenting form denial of certiorari) ("Justice Scalia would grant the petition, vacate the judgment and remand the case:"--involving a conviction under the federal arson statute for burning a house connected to interstate gas and telephone lines--for reconsideration in light of *Lopez*); *Ramey* v. *United States*, No. 94-5755, *cert denied* 514 U.S. _____. 115 S. Ct. 1838 (1995) (Scalia, J., dissenting from denial of certiorari) ("Justice Scalia would grant the petition, vacate the judgment and remand the case"--involving a conviction under the federal arson statute for burning a trailer that received electricity through an interstate power grid--for reconsideration in light of *Lopez*).

purchase goods in interstate commerce.[7] The Government's reliance upon this widely-used theory in this case, however, exceeded even the broad bounds which circuits other than the Second Circuit have established in Hobbs Act prosecutions. Realistically if the government's proof of "depletion of assets" in this case satisfied interstate commerce requirements, then there are no limits to the reach of the Hobbs Act. Indeed, a survey of the lower federal courts' decisions in this area suggests that they recognize virtually no limit. Only a handful of reported decisions in the almost fifty-year history of the Hobbs act have invalidated Hobbs Act convictions on interstate commerce grounds. Those decisions are illustrative of the Governments efforts to transform the Hobbs Act into a general police power statute.

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[7] *See, e.g., United States v. Jones,* 30 F.3d 276 , 276, 284-85 (2d. Cir.), *cert. denied,* ___U.S.___, 115 S. Ct. 602 (1994); *United States v. Ziegler,* 19 F.3d 486, 490-91 (10th Cir.), *cert. denied,* ___U.S.____, 115 S. Ct.1 517; *United States v. Bengali,* 11 F.3d 1207, 1212 (4th Cir. 1993), *cert. denied,* ___*U.S.*___, 114 S. Ct. 1853 (1994); *United States v. McKenna,* 889 F.2d 1168 (1st Cir. 1989); *United States v. Curcio,* 759 F.2d 237 (2d Cir.), *cert. denied,* 474 U.S. 848 (1985); *United States v. Calder,* 641 F.2d 76 (2d.Cir.), *cert denied, 451 U.S. 912 (1981); United States v. Cerilli,* 603 F.2d 415 (3d Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980); *United States v. Rabbitt,* 583 F.2d 1014 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979); *United States v. Phillips,* 577 F.2d 495 (9th Cir.), *cert denied* 439 U.S. 831 (1978); *United States v. Staszcuk, 517 F.2d 53* (7th Cir.) (en banc), *cert. denied,* 423 U.S. 837 (1975); *United States v. Hyde,* 448 F.2d 815 (5th Cir. 1971), *cert. denied,* 404 U.S. 1058 (1972); *United States v. Tropiano,* 418 F.2d 1069 (2dCir. 1969), *cert. denied,* 397 U.S. 1021 (1970). *See generally* Note, *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Corruption,* 58 Notre Dame L.Rev. 1027, 1051-56 (1983).

For example, in *United States v. Mattson*, 671 F.2d 1020 (7th Cir. 1982), the Seventh Circuit invalidated a Hobbs Act conviction based on the depletion of assets theory because there was no proof that the victim (an individual who paid a bribe for an electrician's license) was engaged in or purchased items in interstate commerce. Like this case, the Government in *Mattson* argued that secondary effects on interstate commerce satisfied the jurisdictional element. In particular, the government contended that the victim's employer (a commercial entity) was engaged in interstate commerce. *Id.* at 1024. The Seventh Circuit pointed out that the record clearly established that the employer never reimbursed the victim for the extorted sum and, thus, only the victim's personal assets were depleted. *Id.* In language that describes Tiffany's extortion in this case, the Seventh Circuit observed that "[t]he victim in this case was an individual who had no connection with interstate commerce at all but whose only connection was with a business which was engaged in interstate commerce." *Id.* at 1025. The court declared that "[s]uch as nexus drawn by adding an additional party and more 'tying together' to the well-established depletion-of-assets analysis, is too indirect" *Id.* Finally, the Seventh Circuit concluded,

> We have found no case which extends Hobbs Act jurisdiction so far as to encompass the facts of this case. If a sufficient nexus were found here, we are unable to conceive of an extortionate transaction which would not be punishable under the Hobbs Act. To so hold would mean that the extortion of money from any individual in our society could arguably affect interstate commerce eventually. *Id.*

Similarly, in *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), *cert. denied*, 514 U.S. ___, 115 S. Ct.

1986 (1995), the defendant was convicted of violating the Hobbs Act for robbing an individual at his home. The Fifth Circuit reversed the conviction, concluding that the defendant's conduct lacked the requisite nexus to interstate commerce to justify application of the Hobbs Act. The Fifth Circuit explained that,

> Both direct and indirect effects on interstate commerce may violate section 1951(a). The Government's "depletion of assets" theory falls into the indirect category. This theory relies on a minimal adverse effect upon interstate commerce caused by a "depletion of the resources of the business which permits the reasonable inference that its operations are obstructed or delayed." This thesis usually is applied to businesses or similar entities engaged in interstate commerce, as "in general .... businesses purchase on a larger scale than individuals[,and] extortion [and robbery are] likely to have a greater effect on interstate commerce when directed at businesses rather than individuals.

F.3d at 99-100 (footnotes omitted). The Court then observed, however, that criminal acts directed at individuals are not within the scope of the Hobbs Act unless they (1) deplete the assets of an individual "directly and customarily engaged in interstate commerce," (2) cause or create the likelihood that the victim will deplete the assets of a business engaged in interstate commerce or (3) involved so many individual victims or sums of money so large that there will be a cognizable effect on interstate commerce. *Id.* at 100 (Footnotes omitted). The Court concluded that the evidence in *Collins*, that the victim's work for his employer (a business engaged in interstate commerce) might have been affected by his reaction to the defendant's conduct, was simply "too indirect to present a sufficient nexus with interstate

commerce to justify federal jurisdiction.' *Id.* Finally, the Fifth Circuit emphasized that the Government's theory in *Collins* would make the reach of the Hobbs Act "ubiquitous" *id.*, and "it is manifest that Congress may not regulate conduct that, standing alone, does not directly affect interstate commerce or have a direct effect on a business engaged in interstate commerce." *Id. at* 100-01.

Mattson and *Collins*, however, are rarities in Hobbs Act prosecutions based on the depletion of assets theory. For one other example, see *United States v. Buffey*, 899 F.2d 1402 (4th Cir. 1990), in which the Fourth Circuit reversed a Hobbs Act conviction for lack of proof that the individual victim would have paid extortionate demands out of a corporation's funds (and thus affect interstate commerce) rather than personal funds.[8]

On the other hand, the cases rejecting challenges to application of the depletion of assets theory, utilized by the government in some very imaginative and speculative

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[8] Interestingly, it appears that in only one of these cases did the Government seek certiorari from this court. *See United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), *cert denied*, 514 U.S. _____., 115 S. Ct. 1986 (1995). In neither *Mattson* nor *Buffey* did the Government seek certiorari. See also *United States v. Pappadopoulos*, _____F.3d _____, 1995 U.S. APP. LEXIS 24121 (9th Cir. Aug. 25, 1995)(Wallace,C.J.)(reversing arson conviction under 18 U.S.C..§844(i) because property burned was a private residence that lacked any significant connection to interstate commerce); *United States v. Martin*, _____F.3d_____, 1995 U.S. App. LEXIS 22316 (7TH CIR. AUG. 14, 1995) (Affirming Arson Conviction Under 18 U.S.C. §844(i) because private residence destroyed by fire had in the past been a rental property and might be rented in the future)."

ways, are legion. *See, e.g., United States v. Pascucci*, 943 F.2d 1032, 1039 (9th Cir. 1991) (Ferguson, J., dissenting in part) (arguing that Hobbs Act jurisdiction was not established in that case and in many instances has been extended beyond all reasonable bounds); *see also* Note, *Government Fraud, Waste and Abuse: A Practical Guide to Fighting Corruption*, 58 Notre Dame L. Rev. 1027, 1051-56 (1983) (giving numerous examples of attenuated or speculative effects on interstate commerce that lower courts upheld as sufficient to sustain Hobbs Act convictions), and cases cited in note 7, *supra*. The lower courts' uncritical acceptance of the Government's reliance on the depletion of assets theory apparently continues despite this Court's recent decision in *United States v. Lopez*.

Representative are the Second Circuit's decision in this case and the Seventh Circuit's recent decision in *United States v. Stillo*, 57 F.3d 553, (7th Cir. 1995), a case decided after and with awareness of *United States v. Lopez*. *In Stillo*, a state judge was convicted of violating the Hobbs Act for extorting a bribe from a law firm. For purposes of establishing the interstate commerce nexus, the Government in *Stillo* relied upon the depletion of assets theory. *Id.* at 558. Like all other federal Courts of Appeal to consider the question,[9] the Seventh Circuit rejected the argument that the 'depletion of assets" theory is itself insufficient to establish the interstate commerce nexus noting that it is a theory the Government has relied upon frequently in Hobbs Act prosecutions. The Court then upheld the conviction because in *Stillo*, "it was

[9] See cases cited in note 7, *supra*

established" that the victim (the law firm) "purchased items in interstate commerce" and "[p]ayment of the bribe thus would have the *potential* to affect the firm's ability to purchase goods in interstate commerce--a nexus which this court has held sufficient on numerous occasions." *Id.* (emphasis added). Furthermore, the Seventh Circuit emphasized that the Government proved that the victim *actually* engaged in interstate commerce. *Id.*

Unlike *Stillo* and like *Mattson*, the Government in this case did not even demonstrate that Massaro's victims, with respect to at least four predicate acts, actually purchased items in interstate commerce or otherwise engaged in interstate commerce. Rather, the Government relied on pure speculation both before the jury and in the Second Circuit. A review of the Government's brief in the Second Circuit confirms this beyond dispute. For example, recognizing that only the owner of Partner's Lounge testified regarding the purchase of items in interstate commerce, the Government baldly asserted that "it was reasonable for the jury to infer that other bars did as well...*** Indeed, most basic commodities, including food and alcoholic and other beverages, travel in interstate commerce." (United States Brief in the Second Circuit, at 59-60).

With respect to predicate act 11 (extortion of the Tiffany Shooting Star Agency), the Government expressly relied upon the extension of the depletion of assets theory which the Seventh and Fifth Circuits rejected in no uncertain terms in *Mattson* and *Collins*. The Government's evidence was that Massaro extorted money from Glen Hudson the owner of Tiffany's, as an individual. There was no evidence or proof that Hudson himself was "directly and customarily engaged" in interstate commerce.

Nor was there any evidence that Tiffany's had any connection to interstate commerce. Tiffany's was a booking agency that provided topless dancers to local bars. The Government presented no evidence that the agency purchased items in interstate commerce, hired dancers from outside New York or otherwise in any way engaged in interstate commerce. Instead, the Government's theory of an interstate commerce nexus with respect to Tiffany's required two, incredulous steps. First, "it can reasonable be *assumed* that the bars booking topless dancers through Tiffany's purchased alcoholic beverages from out-of-state." *Id.* (emphasis added)). From that assumption, the jury could then "*infer* that by affecting Tiffany's business with Long Island's topless bars Masssaro's extortion *potentially affected* the bars' abilities to obtain the topless dancers on whom the bars' financial viability depended, thereby having an adverse impact on the bars' abilities to purchase liquor and other commodities that traveled in interstate commerce." *Id.* (emphasis added.)

"To uphold the Government's contentions here, [one] would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez v. United States*, 514 U.S.____,115 S.Ct. 1624, 1634 (1995). The Government's use of the depletion of assets theory in this case demonstrates beyond dispute that--in many lower federal courts--the jurisdictional, interstate commerce requirement is no longer an element that the Government is required to prove in a Hobbs Act case. Moreover, the attenuated version of the theory upon which the Government relied in this case directly contradicts even the sole limitation which some courts

have placed on the theory's use; that, at a minimum the Government must establish that the *victim or target* of the extortionate conduct was engaged *actually and directly* in interstate commerce. In the absence of such proof, the depletion of assets theory does not--indeed cannot--prove any *actual or potential* effect on interstate commerce, much less a direct, significant or otherwise cognizable effect. The use of the depletion of assets theory is reminiscent of the intangible right to good Government' theory that the Government utilized for years in mail fraud prosecutions but which this Court ultimately condemned. *See Mcnally v. United States*, 483 U.S. 350 (1987); *see also Evans v. United States*, 504 U.S. 255, 278 293 n.7 (Thomas, J., dissenting) ("Prior to our decision in *McNally*, the Government's theory had been accepted by every Court of Appeals to consider the issue. We did not consider that acceptance to cure the ambiguity we perceived in the statutory language; we simply reiterated the traditional learning that a federal criminal statute....must be construed narrowly.").

Petitioner respectfully suggest that it is time for this Court to consider and evaluate the depletion of assets theory, a widely-used and approved prosecution theory which has no clear basis in the Hobbs Act itself. At the very least, this Court rather than the federal Courts of Appeal should resolve the question whether the Government may rely solely on speculative applications of the depletion of assets theory to satisfy the interstate commerce element necessary to sustain a conviction under the Hobbs Act.

2. *The Effect of Lopez and Robertson: "Something is More than Nothing."*

As noted previously, some federal courts of Appeal already have begun addressing the constitutionality of convictions under several federal criminal statutes in light of this Court's decision in *United States v. Lopez*," 514 U.S. ____, 115 S. Ct. 1624 (1995). Their decisions, given the Courts disposition of *United States v. Robertson*, 514 U.S.__, 115 S.Ct. 1732 (1995) *(per curiam)*, reflect a continuing uncertainty regarding the constitutional scope of federal criminal statutes enacted pursuant to Congress' power under the Commerce Clause.

For example, in *United States v. Grey*, 56 F.3d 1219 (10th Cir. 1995), the Tenth Circuit reversed a money laundering conviction under 18 U.S.C. §1956(a)(1)(A)(i), a statute which precisely like the Hobbs Act reaches particular conduct that "in any way or degree" affects interstate commerce. In *Grey*, the defendant was charged with money laundering for providing another man involved in an illegal gambling operation with $200 in cash to feed the "pot" available for payout from a video poker machine. The Government proved nothing more than that the payment was made, contending that "[t]he very fact that Mr. Grey transferred cash money, *i.e.*, Federal Reserve Notes, to Mr. Toman affected interstate commerce." *Id.* at 1224. Although the district court rejected that argument, it nonetheless held that the conduct affected interstate commerce because the "proceeds from gambling 'purchased not only machines but vehicles needed to drive to the various locations, service the machines and collect the

proceeds. These actions have a *potential* effect on interstate commerce.' " *Id.* (emphasis added)

The Tenth Circuit reversed the conviction on the ground that the interstate commerce requirement had not been satisfied. First, the Tenth Circuit rejected the government's suggestion that "the interstate commerce nexus was met by proof that the single video poker machine installed at the Halstead American Legion had been manufactured in Colorado and had crossed the state line into Kansas." *Id.* The court pointed out that "[t]here was no proof that any of this activity took place after [the defendant] gave Mr. Toman the money...." *Id.* Thus, observed the Tenth Circuit, "[w]e are left only with the contention that the nexus is somehow met by concluding, without any proof in the record, that the particular $200 handed to Mr. Toman had traveled in interstate commerce." *Id.*

The Tenth Circuit opined that "[t]he Government's burden of proving an effect on interstate commerce under the money laundering statute is not very high. Indeed, it is at the very lowest of thresholds." *Id.* at 1225. Citing a Tenth Circuit decision for the proposition that the Government need only prove a "minimal effect" on interstate commerce, the Tenth Circuit nonetheless concluded that

> "Minimal" means that the Government must prove something, some effect on interstate commerce. Without delving into metaphysics, we can suggest at least that *something is more than nothing*. Here the Government proved nothing, nothing more than that $200 in cash currency was used. The Government would have us hypothesize the source and ultimate destination of the $200 in Federal Reserve Notes

> without one iota of evidence related to its origin or proof of what subsequently took place with the funds....***The necessary underpinning to establish the way or degree that a transaction affects interstate or foreign commerce is always factual in nature. It must be established by direct or circumstantial evidence. *Id.* at 1225. (emphasis added)

In a footnote, the court recognized this Court's admonition in *United States v. Lopez* that federalism requires the federal courts to recognize and give effect to the distinction between what is national and what is local. *Id.* at 1225-26 n.3.

Finally, the Tenth Circuit concluded with an observation that is equally applicable to this case:

> In essence, the Government asks this court to rewrite the money laundering statute. It asks us to vitiate the language "a transaction which in any way or degree affects interstate or foreign commerce," and substitute instead the notion that "federal jurisdiction under the money laundering statute is vested in any transaction involving Federal Reserve Notes." This we refuse to do. We lack both the inclination and the power. Moreover we doubt that even Congress could do this without offending the constitution. *Id.* at 1226.

As noted previously, the money laundering statute's "in any way or degree" language tracks the language of the Hobbs Act precisely. In this case, as in *Grey*, the Government has argued essentially that the jury and the Second Circuit can "assume" an effect on interstate commerce because everything a person does has some effect on interstate commerce.

In contrast to the Tenth Circuit, other federal Courts of Appeal--in decisions rendered after *Lopez* and *Robertson*--have upheld convictions under federal criminal statutes based exclusively on Congress' commerce power. For example, in *United States v. Moseby*, 60 F.3d 454 (8th Cir. 1995), the Eighth Circuit upheld a conviction under 18 U.S.C. §922(g)(1) for possession of ammunition after having been convicted of a felony. The ammunition was manufactured and possessed entirely in the same state but the Eighth Circuit nonetheless distinguished *Lopez* on the ground that some components of the ammunition had traveled in interstate commerce. Similarly, in *United States v. Oliver*, 60 F.3d 547, 1995 U.S. App. LEXIS 16432 (9th Cir. July 6, 1995), the Ninth Circuit upheld a conviction under the federal carjacking statute on the grounds that, although the conduct at issue was local, the car involved had traveled in interstate commerce and cars are instrumentalities of interstate commerce. In *Cheffer v. Reno*, 55 F.3d 1517, (11th Cir. 1995), the Eleventh Circuit upheld the Freedom Of Access to Clinic Entrances Act of 1994, 18 U.S.C. §248, on the grounds that it involved the regulation of a commercial activity (the provision of reproductive health services) and that doctors and patients often travel across state lines to provide and receive services.

This case presents the Court with an opportunity to resolve much of the uncertainty that exists in the wake of *Lopez*, and does so in the context of an important federal criminal statute, the Hobbs Act.

3. Federalism Concerns

The interstate commerce question presented in this petition raises substantial federalism issues. All of the conduct at issue in this petition already is criminalized and made punishable under New York law. *See, e.g.*, N.Y. Penal Law §155.05 (extortion); *id.* §460.00 *et seq.* (racketeering). For several years now, commentators and scholars have recognized the importance and complexity of the Commerce Clause issues raised by the federalization of criminal law. Moreover, like the rare panel of judges in the Fifth (*Lopez and Collins*), Seventh (*Mattson*), Ninth (*Robertson*) and Tenth (Grey) Circuits, some have expressed doubts regarding the constitutionality and propriety of federalizing criminal law.[10] This case presents

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[10] *See, e.g.*, Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213, 214 (1984); Barry Breen, *The Travel Act* (18 U.S.C. §1952): *Prosecution of Interstate Acts in of Aid of Racketeering*, 24 Am. Crim. L. Rev. 125, 164 (1986); H. Scott Wallace, *The Drive to Federalize is a Road to Ruin--When More is Less*, 8-Fall Crim. Just. 8 (1993); Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalizaton of Criminal Law*, 79 Minn. L. Rev. 455, 456 (1994) (observing that the federal criminal code now contains more than 3,000 offenses, that federal criminal case filings increased seventy percent between 1980 and 1990, and that criminal cases now consume half of the federal judiciary's total time); Thomas M. Mengler, *The Sad Refrain of tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. Kan. L. Rev.l 503, 539 (1995) *Cf.* G. Robert Blakey & Thomas A. Perry , *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and* the *Various Proposals for Reform: "Mother of God--Is This the End of* RICO?", 43 Vand L. Rev. 851 (1990). *See generally* William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 Stetson L. Rev. 651 (1994).

a clean opportunity for the Court to address some of the substantial commerce clause issues raised by the continuing expansion of federal criminal jurisdiction.

II. The Government's Failure To Disclose The Discovery Of The Bullet Resulted In A Trial By Ambush And Violated The Defendant's Rights Under The Due Process Clause.

The Government's delinquency with regard to the discovery and disclosure of the bullet was threefold: 1) it waited over three years to conduct a thorough search of the vehicle for a bullet; 2) it waited for five days, into the trial to disclose the discovery of the bullet to the defense; and, 3) it did not provide the defense with a ballistics report until three weeks into the trial.

Despite the presence of an exit wound in Fiorito's head and the fact that Esposito told the Government as early as April of 1991 that a shot had been fired in the vehicle, no one attempted to search the car for a bullet until the week before trial. Thus, the defendant prepared his defense based upon ballistics and crime scene reports that showed no bullet in the car and no blood on the front passenger seat of the car where Massaro allegedly sat after carrying the dead body. (TR. 931-934)[11]

Not having been advised of the discovery of a bullet in the car, defense counsel told the jury in his

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[11] There was virtually no corroboration of Esposito's claim that Massaro, rather than Esposito acting alone, killed Fiorito And it was Esposito, not Massaro, who had the clearest motive to kill Fiorito. *(See* pp. 9 - 10, *supra)*

opening statement that "[t]here is not one scientific shred of evidence to indicate that Joseph Massaro was in that car, was in that place or had anything to do with [the murder of Joseph Fiorito], except Patty, who is buying his freedom." (TR.41-42). Not until Esposito had been on the stand for at least three days, and defense counsel had started his cross-examination, did the Government finally disclose that a bullet had been discovered in the car. (JA. 107). As counsel argued in his motions for a mistral and to preclude the evidence, the defendant proceeded to trial on the theory that, since there was no bullet and no blood on the front passenger seat, no shots were fired in the car. From this the defendant intended to argue that the jury could not and should not believe Esposito, at least with respect to the murder, the most serious charge. (TR. 1986-1995).

Rule 16 of the Federal Rules of Criminal Procedure requires the government, upon request, to permit the Defendant to inspect and copy "papers, documents, photograph,s [and] tangible objects," as well as reports of scientific tests, which are in the Government's possession or control and which are material to the preparation of the defense or which the Government intends to use as evidence in chief at trial. Fed.R.Crim.P.Rule 16(c) and (d). The defendant specifically requested all forensic tests (JA. 103-105), and he was provided with the autopsy and forensic reports well before trial. Thus, he conducted his trial preparation, engaged experts, (Tr. 3428, 3433-3438), and gave an opening statement to the jury with confirmed belief that the Government had conducted a thorough investigation and found no bullets in the car. The Government, however, decided to revisit its investigation less than a month before trial, which resulted in the discovery

of a bullet and additional forensic tests, none of which were disclosed to the defense before trial.

The Government's excuse in this case was not sufficient to justify the delay. Between the time Esposito began cooperating in April, 1991 and January of 1993, there was no attempt to search the car for a bullet. When police sergeant Carbone discovered that the car had been released, he did nothing more than make a phone call to the record owner of the car. A week before trial, however, when time was of the essence, he successfully tracked down the car and did a search, which ultimately led to the discovery of the bullet. (TR. 4184-92, 3684-3701) By this time, the defense had already developed a trial strategy relying on the absence of evidence to corroborate Esposito's tale of the shooting. They had already consulted and engaged experts. A continuance, which the court offered would not and could not have compensated for the prejudice visited upon the defendant. An elaborate trial strategy had to be jettisoned mid-trial and counsel's claim that there was not a shred of scientific evidence had been soundly contradicted. (Tr. 1994, 3446).

In *Kyles v. Whitley*, ____U.S.____, 115 S.Ct. 1555 (1995), this court recognized the validity of a defense based on police negligence. *Id.* at 1572 (citing *Bower v. Maryland*, 799 F.2d 593, 613 (10th Cir. 1986) (court may consider use of evidence to discredit investigation or charging decisions in assessing *Brady* violations); *Lindsay v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (new trial ordered when withheld *Brady* evidence carried potential for discrediting police methods)). In Massaro's case, he was deprived of the opportunity to open to the jury regarding the credibility of the investigation. Likewise if he had had

the ballistics report at the time he cross-examined the medical examiner, he would simply have highlighted the fact that x-rays were missing, rather than calling for their production to demonstrate that the shot creating the exit wound was fired last, so that a bullet should have been found in the car if Esposito's story were true. (Tr. 559, 1584-6, 1594, 1600). The Government's dilatory discovery and disclosure of the bullet therefore affected and undermined his entire trial strategy.

In summary, both the physical evidence and evidence of Esposito's personal motivations undermined Esposito's claim that Massaro committed the murder. Under such circumstances, admission of the bullet to corroborate Esposito cannot be considered harmless error. The murder in aid of racketeering charge was the most serious charge in the indictment and carried a life sentence. The bullet discovered at the eleventh hour and withheld from the defense until the trial was well under way, should not have been admitted. It deprived the defendant of a fair trial and sheds grave doubt on the reliability of the jury's verdict on the murder count.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari and set this case for plenary review. Alternatively, petitioner requests that the Court exercise its supervisory authority over the Second Circuit, *see* Sup. Ct. R. 10.1(a), and grant the Petition, vacate the Second Circuit's judgment, and direct that Court to address and resolve the interstate commerce issues in light of this Court's recent decision in *United States* v. *Lopez* and (2) the disclosure issue in light of this Court's recent decision in *Kyles v. Whitley.*

Respectfully submitted,

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No. 95-461

In The

Supreme Court of the United States

October Term, 1995

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JOSEPH MASSARO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

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Appendix A - Opinion of the United States Court of Appeals for the Second Circuit, Filed May 18, 1995 [Pages 1a - 10a]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 18th day of May, one thousand nine hundred and ninety-five.

PRESENT:

HON. FRANK X. ALTIMARI,
HON. DENNIS G. JACOBS,
HON GUIDO CALABRESI,
Circuit Judges.

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UNITED STATES OF AMERICA,

Appellee,

-v.- 94-1447

JOSEPH MASSARO, also known as Joey Bang Bang,

Defendant-Appellant.

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Appeal from the United Statues District Court for the Southern District of New York.

Appendix A
[Opinion of the USCA for the Second Circuit]

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Cedarbaum, J.), and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Defendant-Appellant Joseph Massaro ("Massaro") appeals from a judgment entered, after trial to a jury, in the United States District Court for the Southern District of New York convicting him of conspiring to conduct and participate in the affairs of a racketeering enterprise in violation of 18 U.S.C. § 1962(d) ("RICO"); participating in the conduct of the affairs of the enterprise in violation of 18 U.S.C. § 1962(c); murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(1), (2); three counts of extortion in violation of 18 U.S.C. §§ 1951 and 2; conspiracy to make extortionate extensions of credit and to use extortionate means to collect in violation of 18 U.S.C. §§ 892, .894; loansharking in violation of 18 U.S.C. §§ 893, 2; and travelling interstate in aid of the extortion recketeering counts in violation of 18 U.S.C. §§ 1952 and 2.

Massaro, a soldier of the Lucchese Organized Crime Family ("the Family"), ran a business called the Entertainment Plus Agency ("Monterrey") that booked topless dancers for local clubs. The evidence

at trial demonstrated that, in an effort to take over Long Island's topless bar industry, Massaro waged a campaign of intimidation to persuade clubs and bars to book dancers through Monterrey rather than its competition. Toward this end, Massaro assaulted and threatened the owner of rival booking agency, "Tiffany's." Glen Hudson ("Hudson"), the owner, testified at trial. In early 1986, while Hudson was on vacation, Masseur and Patrick Esposito ("Esposito"), a cohort who became the government's key witness at trial, persuaded Hudson's business partner to accept Massaro as a partner in Tiffany's. Upon Hudson's return, he was met at the business by Esposito who told him that he could either accept a $10,000 pay-off to get out of the business, or wind up in the hospital. Instead, Hudson went to work for a new booking agency controlled by a different organized crime family. Massaro soon merged Tiffany's with his existing business and called the new enterprise "Startime."

In the late 1980s, Massaro sought to expand his control over Long Island's topless bar industry. An associate in Massaro's crew, Joseph Fiorito ("Fiorito"), twice tried to burn down the Carousel Lounge at Massaro's direction because it had defected from Startime. Esposito and Fiorito also set fire to the Excaliber and the Class Act Bar, clubs whose owners either refused to use Startime or declined to make pay-offs, or both. Three other area bars that had stopped using Startime were left alone

because they were, by then, purportedly controlled by the Gambino Organized Crime Family.

Massaro also attempted to take over a non-topless bar in Babylon, Partner's Lounge ("Partner's"). After staging a robbery, Masseur began extorting the bar owner. However, by the time Exposito, with the Family's approval, decided to oust Gene Kruse ("Kruse"), the bar's owner, Kruse had gone to the Suffolk County District Attorney's Office. Cruse, who also testified at trial, began recording his conversations with Esposito, Fiorito and Massaro. Kruse began making his weekly payments in marked bills, and also arranged to borrow money from Massaro. In addition, Massaro and his henchmen extorted two construction industry firms, American Application Associates of New Jersey and Keith Gabel Construction, which together owed $75,000 to a business called Expert Rigging and Scaffolding. Massaro and Esposito collected the debts, pocketing half the payments. The two businesses complied because Massaro threatened their staffs with physical injury, harm to their children, and union trouble. Finally, Massaro ran a successful loansharking operation, as well as an illegal horse betting parlor.

By the end of the summer. of 1989, Massaro had determined to kill Fiorito because Fiorito had been stealing from him. Together with Esposito, Massaro lured him to an empty home located on Butterfly Lane in Hauppauge on September 19, 1990. After shooting Fiorito once in the head in the

basement of the house, Massaro, with Esposito's help, carried the body up the stairs and through several rooms on the first floor before going out a side entrance. They placed the body in a sitting position on the rear seat of the car that had been driven by Fiorito, with the head resting on the middle of the seat. As they crossed into New York City, Massaro, expressing concern that Fiorito might not be dead, again shot him in the head. Massaro and Exposito pulled over in a Queens neighborhood and propped the body up so that it would appear to be sleeping. Leaving Fiorito's body in the car, the two left in a different vehicle with an associate who had followed them.

The next day, Massaro sent crew members to Butterfly Lane to clean up the basement and retrieve the shell casing. The men reported that they found the casing but that there was too much blood to be removed without special materials. Early on September 21, the New York City police discovered Fiorito's body, lying across the back seat of the parked car with the head pointing down toward the driver's side floor. The police found a spent shell casing on the floor behind the passenger seat, but no bullet. Likewise, they found no bullet and no blood in the front seat.

Although Esposito had retained couinsel, he began cooperating with the government through court-appointed counsel. His information led the police to the murder scene where they discovered

dried blood, remnants of brain matter, and a plastic bag in which the body had been wrapped when it was carried through the house. Massaro was arrested in June 1992. After state criminal charges against Esposito were dismissed as a result of his cooperation, the car used to transport Fiorito's body, and in which he was shot for a second time, was released from state custody. It had not been thoroughly searched.

Trial commenced in the district court on September 7, 1993. Several days before trial, police sergeant Richard Carbone ("Carbone") succeeded in tracking down Fiorito's car. Carbone searched the car again, lifting up its carpeting, but found nothing. As an indirect result of this search however, the new owner of the car discovered a hole in the floorboard, and a bullet. On September 6, 1993, the day before opening statements, the car's new owner advised the government of the discovery.

The defense's theory, as presented in its opening statement on Tuesday, September 7, 1993, was that Esposito alone murdered Fiorito. In the course of arguing that Massaro had no motive to murder Fiorito and that no physical evidence linked him to the crime, counsel claimed that, "[t]here is not one scientific shred of evidence to indicate that Joseph Massaro was in that car, was in that place, or had anything to do with this case ...." The government did not refer to the bullet in its opening statement.

On Saturday, September 11, 1993, the government advised, by faxed letter, Massaro's lawyer of the existence of the bullet, and offered to make available a videotaped reenactment of its discovery. When the trial resumed on Monday, counsel never mentioned the bullet. On Thursday, September 23, 1993, counsel raised the issue with the court and sought to expedite the ballistics tests. The government indicated that it did not yet know whether it would offer the bullet into evidence. Massaro neither sought to preclude the bullet, nor requested a continuance pending the forensic results. Sometime before trial on the following Monday, September 27, 1993 , the government advised Massaro that its expert had concluded that the bullet matched the fragments recovered from the body, and had probably been fired from the same gun.

The next day, Massaro moved for a mistrial, or, in the alternative, to preclude admission of the bullet because of the late disclosure by the government. The district court rejected the motion for a mistrial and ruled that the bullet evidence was admissible because neither the opening statements nor the evidence adduced to date had irretrievably committed Massaro to a defense position. The court offered a continuance to allow Massaro to examine the evidence and make any necessary adjustments to his strategy. The court also allowed Massaro to recall any witnesses in light of the newly discovered evidence. Massaro recalled one investigator, but

declined the continuance Over objection, and after rejecting a motion for a mistrial, the district court admitted the bullet evidence.

We address Massaro's claim on appeal that the district court erred in admitting the bullet evidence. Massaro challenges the government's handling of the bullet evidence. Federal Rule of Criminal Procedure 16(a)(1)(C) requires the production by the government of any tangible items or documents "which are within the possession, custody, or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at trial." Rule 16 rulings by the district court are reviewed for the abuse of discretion. *See United States v. Sanchez,* 912 F.2d 18,21, (2d cir. 1990.). Reversal is warranted where nondisclosure by the government results in substantial prejudice to the defendant's ability to present a strategy. *Id.* In determining whether substantial prejudice has accrued, the Court looks to (1) the nature of the untimely evidence; (2) the extent to which it went to critical issues; (3) the reason that it was not timely produced; and (4) the strength of the remainder of the government's case. *See United States v. Steven's, 985 f.2d 1175, 1181 (2d Cir. 1993).*

We conclude that, although the government's five-day delay in advising the defense of the discovery of the bullet was regrettable, it was not error to admit the evidence. There is no question but

that the government should have advised the defense immediately of the bullet's discovery. However, the government's conduct did not irreparably damage Massaro's strategy. Massaro had given his opening statement and begun cross- examination of Esposito before learning about the bullet. Massaro has not claimed that he would have changed his cross-examination had he been aware of the bullet. Thus, we address only the opening statement.

Massaro's defense strategy was to impugn Esposito's credibility by arguing that it was inherently incredible, given the lack of hard evidence, that the second shot ever occurred. He intended to argue to the jury that, if Esposito could not be believed in this detail, none of his testimony was trustworthy. Nothing in his opening statement, however, was rendered false by the bullet evidence. That fact makes this case distinguishable from *People v. Thompson,* 71 N.Y. 2d 918, 523 N.E. 2d 819, 528 N.Y.S. 2d 532 (1988), upon which Massaro relies. There, the New York Court of Appeals reversed a conviction because the government withheld a witness's prior statement until the defense was already irrevocably committed to its strategy of suggesting that the witness was not credible. In this case, the district court properly determined that Massaro had not yet committed himself to an untenable position. Further, the defense had ample other detrimental information with which to attack Esposito's credibility, Massaro's rejection of a continuance supports our conclusion.

Massaro cites *United States v. Kelly*, 420 F. 2d 26, 29 (2d Cir. 1969), for the proposition that a continuance would not have adequately addressed the problem. In fact, the *Kelly* court suggested that it was error not to grant a continuance, *id* at 29, thus implying that a continuance would have cured the injury. Massaro's failure to avail himself of the offer of a continuance calls into doubt the claim of error. *See, e.g., United States v. Boney*, 572 F.2d 397, 402-03 (2d Cir. 1978). Massaro's decision to proceed with his strategy despite his knowledge that the bullet might be matched to existing shell fragments weakens his claim. We cannot conclude that there was substantial prejudice to Massaro as a result of the government's delay in advising the defense of the bullet's discovery; the district court did not abuse its discretion in admitting the evidence.

Massaro's remaining claims having been carefully considered, we AFFIRM the judgment of the district court.

HON. FRANK X. ALTIMARI,

HON. DENNIS JACOBS,

HON. GUIDO CALABRESI,
Circuit Judges.

Appendix B - Constitutional and Statutory Provisions Involved [Pages 11a - 12a]

The Fifth Amendment to the United States Constitution, states, in pertinent part:

> No person shall be * * * deprived of life, liberty or property without due process of law * * *.

The Hobbs Act:

> Whoever, *in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce*, by robbery or extortion or tempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. 18 U.S.C. §1951(a) (emphasis added).
>
> As used in this section--
>
> The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; *and all other commerce over which the*

Appendix B
[Constitutional and Statutory Provisions Involoved]

United States has jurisdiction. 18 U.S.C. §1951(b)(3) (emphasis added).

Rule 16 of the Federal Rules of Criminal Procedure:

Documents and Tangible Objects. Upon request of the defendant the Government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, and which are material to the preparation of the defendant's defense or are intended for use by the Government as evidence in chief at the trial or were obtained from or belong to the defendant.

Reports of Examinations and Tests. Upon request of a defendant the Government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the Government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Government, and which are material to the preparation of the defense or are intended for use by the Government as evidence in chief at the trial.